

1
2
3
4
5
6
7 UNITED STATES DISTRICT COURT
8 DISTRICT OF NEVADA
9

10 UNITED STATES OF AMERICA,

3:95-CV-00757-HDM

11 Plaintiff,

12 and

ORDER

13 PYRAMID LAKE PAIUTE TRIBE OF
14 INDIANS,

15 Intervenor-Plaintiff,

16 v.

17 BOARD OF DIRECTORS OF THE
18 TRUCKEE-CARSON IRRIGATION
19 DISTRICT, individually and as
20 Representatives of the Class of
all Water Users in the Newlands
Reclamation Project; TRUCKEE-
CARSON IRRIGATION DISTRICT,

21 Defendants,

22 and

23 STATE OF NEVADA, Department of
Conservation and Natural
Resources, Division of Wildlife
24 and Division of State Lands;
CHURCHILL COUNTY; DODGE
25 BROTHERS AND DOGE JR. FAMILY
TRUST; DAVID P. HARRIGAN;
26 GEORGE AND SHELLY RAE
RAKURSHIN; WILLIAM D. AND
27 GWENDOLYN WASHBURN; MARVIN
WEISHAUP; HOWARD D. WOLF
28 FAMILY TRUST; RAY CONLAN;

1 CORKILL BROS., INC.; CALVIN R.
 2 MOFFITT AND CANDACE J. MOFFITT;
 3 BELL FAMILY TRUST; LARRY L.
 4 FRITZ FAMILY TRUST; DAVID L.
 5 MATLEY AND CHRISTINE L. MATLEY
 6 FAMILY TRUST AND DAVID MATLEY;
 7 HAROLD G. AND RHONDA JOHNSON
 8 AND JOHNSON FAMILY TRUST; A&A
 9 DAIRY; JOYCE LOHR; PERALDO
 10 BROTHERS; STILLWATER FARMS,
 11 INC.; CHARLES P. FREY, JR. AND
 12 DEBRA S. FREY; NORMAN W. FREY;
 13 FALLON-PAIUTE SHOSHONE TRIBE,

14 Intervenor-Defendants.
 15 _____/

16 On April 20, 2009, the Court of Appeals entered an order
 17 largely affirming this court's decision of December 3, 2003, but
 18 vacating and remanding for recalculation of the recoupment for the
 19 years 1974, 1975, 1978, 1979, and 1980. On October 6, 2011, this
 20 court entered its order calculating the total amount subject to
 21 recoupment for those years to be 309,480 acre feet. The court did
 22 not recalculate and include recoupment for four additional years -
 23 1973, 1976, 1985, and 1986 - as they were not included in the Court
 24 of Appeals' mandate.

25 On July 22, 2013, the Court of Appeals withdrew and amended
 26 its original mandate to include recoupment for any excess
 27 diversions in 1973, 1976, 1985, and 1986, subject to this court's
 28 consideration of Truckee-Carson Irrigation District's ("TCID")
 argument that an alternative basis exists for denial of recoupment
 in 1985 and 1986. The Court of Appeals stated:

With regard to 1985 and 1986, there may be merit to
 TCID's contention that there is an alternative ground in
 the record for the district court's finding that
 recoupment was unavailable or limited for those years,
 namely, deviation from the OCAP authorized by court
 order. We leave to the district court to determine
 whether, and to what extent, this consideration affects
 the recoupment available for 1985 and 1986. . . .

1 *United States v. Bd. of Directors of Truckee-Carson Irr. Dist.*, 723
2 F.3d 1029, 1035 (9th Cir. 2013).

3 On January 29, 2014, this court issued its order determining
4 that the amount subject to recoupment for 1973 was 23,224 acre
5 feet, and the amount subject to recoupment for 1976 was 3,204 acre
6 feet. Following the submission of briefs by the parties, on May
7 11, 2015, the court concluded that under applicable court orders,
8 diversions made between January 15, 1985, and November 15, 1985,
9 and March 13, 1986, and July 1, 1986, are not subject to
10 recoupment, but that diversions in excess of the OCAPs for the
11 periods January 1, 1985, through January 15, 1985, November 15,
12 1985, to March 13, 1986, and July 1, 1986, through the end of 1986
13 may be subject to recoupment. The parties were directed to meet
14 and confer to determine whether they could agree on an amount
15 subject to recoupment for those time periods in 1985 and 1986.
16 They could not.

17 Presently before the court, then, are the parties' briefs
18 regarding the amount of recoupment, if any, each believes should be
19 awarded for 1985 and 1986. (Doc. #868, #869, #870, #871, #876,
20 #877, #878). The court concludes that, on the record before the
21 court at the time of its decision, there is insufficient evidence
22 that was admitted in the government's case in chief which supports
23 any recoupment for 1985 and 1986. The data on which the government
24 and Tribe rely was taken from a document prepared by Ali Shahroody
25 and was admitted for limited rebuttal purposes. At the time, the
26 court observed that it was not persuaded by the data submitted by
27 Shahroody. Although the government and the Tribe have cited
28 portions of the record containing historical data they argue

1 supports an award of recoupment, calculating recoupment based on
2 that data would require an entirely different methodology than that
3 adopted by the court. And that is even if the court were inclined
4 to modify the methodology to a monthly rather than yearly analysis.

5 Accordingly, the court concludes that the government and
6 Tribe's claims for recoupment for 1985 and 1986 should be denied.

7 **IT IS SO ORDERED.**

8 DATED: This 25th day of January, 2016.

9
10 

11 UNITED STATES DISTRICT JUDGE
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28